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April 7, 2022

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
45 L Street, N.E.  
Washington, DC 20554

Re: Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended By the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311

Dear Secretary Dortch :

On April 5, 2022, the following people met virtually with Media Bureau staff: Don Knight, Senior Assistant City Attorney, City of Dallas; Frederick E. Ellrod III, Director, Communications Policy and Regulation Division, Department of Cable and Consumer Services, Fairfax County, Virginia; Nancy Werner, General Counsel, NATOA; Gerard Lavery Lederer, partner, and Cheryl A. Leanza, of counsel, Best Best & Krieger, LLP. We met with Holly Saurer, Michelle Carey, Maria Mullarkey, Brendan Murray and Raelynn Remy.

The parties met to describe the current state of affairs in cable franchising now that the litigation in *City of Eugene v. Federal Communications Commission* is complete.<sup>1</sup> Local government seeks to ensure that the Commission will move to implement the ruling of the U. S. Court of Appeals for the Sixth Circuit in order to clarify the current state of the law and the Commission's rules. Specifically, although the Sixth Circuit ruled that, under the FCC's in-kind rule, 47 C.F.R. § 76.42, any in-kind cable related franchise obligation must be valued at the cable operator's marginal cost,<sup>2</sup> some cable operators are issuing—as recently as this year—invoices to local government departments for the retail price of cable connections. Not only was the valuation incorrect, no negotiations had occurred. The Commission's rule should be updated to reflect the

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<sup>1</sup> *City of Eugene, Oregon v. Federal Communications Commission*, 998 F.3d 701 (6<sup>th</sup> Cir. 2021), cert. den. 142 S.Ct. 1109 (2022).

<sup>2</sup> *Eugene*, 998 F.3d at 710.

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court's opinion, including the obligation of cable operators and local governments to negotiate any necessary changes to a franchise within a reasonable time.<sup>3</sup>

Local governments are also facing challenges in obtaining agreements with cable operators to build out cable system institutional networks to small businesses. Small businesses often request service to industrial parks where communications infrastructure is inadequate or competition is scarce. But cable operators will not agree to serve those customers unless the customer or the franchising authority pays for those networks, even though the FCC's order and the Sixth Circuit were clear that build-out costs are the responsibility of the cable operator.<sup>4</sup> A local government negotiating build-out of a cable system to serve private small businesses is acting no differently than when it negotiates to ensure particular residential subdivisions are served: buildout of the cable system is the cable operator's responsibility regardless of whether the customer is a business or residence. The cable operator is earning a profit offering service to a private customer in both cases. The Cable Act confirms institutional networks are "constructed ... by the cable operator" and generally serve non-residential customers.<sup>5</sup>

Negotiating for build-out of an institutional network to serve nonresidential customers is different from a franchising authority's reservation of governmental capacity on that network for its own use. The Sixth Circuit was also careful to note that it is an LFA's designation of *educational or governmental capacity* which would count against the franchise fee because "a franchising authority 'may require' that 'channel capacity on institutional networks'—or 'I-Nets,' which provide various services to non-residential subscribers, see *id.* § 531(f)—'be designated for educational or governmental use' ...."<sup>6</sup> When the *Third Order* described the obligations franchising authorities may impose on cable operators, it correctly identified "*dedicated channel capacity* on I-Nets."<sup>7</sup> The FCC's codified in-kind rule, 47 C.F.R. § 76.42(a)(3), incorrectly conflates

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<sup>3</sup> *Third Order*, 34 FCC Rcd at 6877-78, ¶ 62, n.247.

<sup>4</sup> In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 As Amended By the Cable Television Consumer Protection and Competition Act of 1992, 34 FCC Rcd. 6844, 6875, ¶57 (2019) (*Third Order*) ("franchise terms that require cable operators to build their systems to cover certain localities in a franchise area do not count toward the five percent cap.")

<sup>5</sup> 47 U.S.C. § 531(f). Nor does 47 U.S.C. § 541(a)(2)(B), the provision relied upon by the FCC and the court, distinguish between residential and business customers.

<sup>6</sup> *Eugene*, 998 F.3d at 708.

<sup>7</sup> *Third Order*, 34 FCC Rcd. at 6874, ¶ 55.

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*governmental or educational capacity* on institutional networks with the construction of the networks themselves.<sup>8</sup>

In addition to addressing the impact of the Sixth Circuit’s ruling on the codification of the in-kind rule, the Commission should resolve the issue by completing the portion of the rulemaking it left open when it issued the *Third Order*. We urge the Commission to determine that PEG and I-Net capacity is a capital cost excluded from franchise fees under 47 U.S.C. § 542(g)(2)(C).<sup>9</sup> This could be easily accomplished through a Bureau notice seeking an update to the record, followed by a concise order.

Finally, local governments explained that—like Congress—states and localities are working hard to ensure that all people have access to communications services, including broadband, addressing one of the Commission’s top priorities. For example, the state of California adopted legislation last year which requires the California Public Utility Commission to map broadband deployment. Moreover, the CPUC is considering adopting minimum service standards for broadband.<sup>10</sup> States clearly have this authority.<sup>11</sup> But the Commission’s mixed use rule incorrectly calls into question such state authority because, as the Sixth Circuit found, it does not accurately state the law.

The Sixth Circuit found serious flaws with the Commission’s rule. As the court noted, “the rule is the FCC’s synthesis of the Act’s preemption clause and various limitations that Title VI places upon franchisors’ regulatory authority.” The court goes on to quote the FCC’s description

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<sup>8</sup> We also note that the codified in-kind rule does not explicitly exclude consumer protection or privacy requirements, and that the Sixth Circuit concluded that similarly-situated customer service requirements “are not a ‘tax, fee, or assessment’ in the first place, and hence fall outside the franchise-fee definition altogether.” *Eugene*, 998 F.3d at 708.

<sup>9</sup> *Third Order*, 34 FCC Rcd at 6868, ¶¶ 43-44.

<sup>10</sup> S.B. 28, ch. 673, 2021 Cal. Stat.; CPUC, Order Instituting Rulemaking Proceeding to Consider Amendments to General Order 133, Rulemaking 22-03-016 (Mar. 23, 2022).

<sup>11</sup> *E.g.*, 47 U.S.C. §§ 541(d)(2) (“Nothing ... shall affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service....”), 552(d) (“Nothing ... shall ... prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter”); Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(1), 101 Stat. 56, 143 (1996), *reprinted in* 47 U.S.C. § 152 note (the 1996 Act does not “modify, impair, or supersede Federal, State, or local law unless expressly so provided”); *Mozilla Corporation v. Federal Communications Commission*, 940 F.3d 1, 74-75 (D.C. Cir. 2019) (FCC lacks authority to preempt broadband regulation where it lacks authority to regulate); *ACA Connects v. Bonta*, 24 F.4th 1233 (9th Cir. 2022) (same).

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of the rule: “a franchising authority may not regulate the non-cable services of a cable operator ‘except as expressly permitted in the Act.’ *Third Order* ¶ 64. And that express permission, the FCC believes, is something the Act almost never grants.”<sup>12</sup> In the next paragraph, the court expressly rejects this analysis: “*the Act nowhere states or implies that franchisors may regulate cable operators only as ‘expressly permitted in the Act.’*”<sup>13</sup> The Sixth Circuit confirms that “[t]he relevant question as to preemption, therefore, is *not* whether the Act itself authorized a franchisor’s action.”<sup>14</sup> In fact, the court found, “Congress went out of its way not to suggest that federal law is the fountainhead of all franchisor regulatory authority. What we know from §§ 544(a) and 556(c), rather, is that federal law circumscribes the franchisors’ authority as to cable operators. The relevant ‘rules’ as to the preemption of state or local actions are the rules stated in those provisions. *The FCC’s formulation, respectfully, only gets in the way.*”<sup>15</sup> The court went on to explain how preemption under Section 554(a) and 555(c) should be determined: “The question presented, therefore, is simply one of preemption; and §§ 544(a) and 556(c) tether the preemption analysis to the terms of the Act itself. .... [T]he test for preemption under those provisions is whether state or local action is ‘inconsistent with’ a specific provision of the Act.”<sup>16</sup> The court used traditional preemption analysis in its opinion, not the FCC’s mixed-use rule.

In sum, the Sixth Circuit rejected the FCC’s preemption analysis and thus the mixed-use rule that flowed from the flawed analysis. The court agreed with Petitioners that the FCC’s rule “does not follow from the Act’s terms,” found the FCC’s formulation “gets in the way,” that the correct analysis is “simply one of preemption,” and the correct preemption test is “whether state or local action is ‘inconsistent with’ a specific provision of the Act.”<sup>17</sup> The Sixth Circuit further found that its analysis was consistent with the Fifth Circuit’s decision in *City of Dallas*. The FCC must, at a minimum, repeal the codified mixed-use rule to avoid conflict with the Fifth and Sixth Circuits.<sup>18</sup>

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<sup>12</sup> *Eugene*, 998 F.3d at 710.

<sup>13</sup> *Id.* (emphasis added) (noting accord with *City of Dallas v. F.C.C.*, 165 F.3d 341, 348 (5th Cir. 1999)).

<sup>14</sup> *Id.* at 711.

<sup>15</sup> *Id.* (emphasis added).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 710-11.

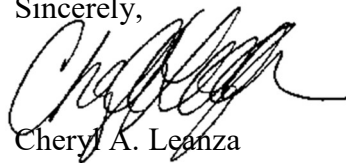
<sup>18</sup> The rule is also self-evidently incorrect in many ways. One of the most obvious is that it prohibits, in any state where the state operates as a franchising authority, state regulation of intra-state telecommunications services, which is inconsistent with core provisions of the Communications Act, including 47 U.S.C. § 152; and the Sixth Circuit specifically did not address state or local regulation of telecommunications service, 998 F.3d at 712, n.2. And the Cable Act is

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We appreciate the opportunity to express our views to the Commission and urge it to quickly implement the Sixth Circuit's recent ruling as discussed herein. Pursuant to 47 C.F.R. § 1.1206, a copy of this letter is being filed via ECFS. Please do not hesitate to contact me with any questions.

Sincerely,



Cheryl A. Leanza  
for BEST BEST & KRIEGER LLP

cc: Holly Saurer  
Michelle Carey  
Raelynn Remy  
Maria Mullarkey  
Brendan Murray

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clear that LFAs may regulate privacy, consumer protection, customer service and build-out, none of which are recognized by the mixed-use rule. 47 U.S.C. §§551(g), 552(a), 541(a)(3)-(4).